SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 227

GREAT SOUTHERN TRUCKING COMPANY, A CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Reference to Official Report of Opinion Rendered in Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is officially reported in 127 Fed. (2d) 180 (C. C. A. 4th).

Statement of Grounds on Which Jurisdiction of This Court Is Invoked.

Jurisdiction to review and determine this cause is conferred upon the Court by the provisions of Section 347 of Title 28, U. S. C. A.

The petitioner prays the Court to assume such jurisdiction and grant writ of certiorari herein on the grounds that the proper decision of the issue here involved is important in the administration of the National Labor Relations Act (Section 151 et seq. of Title 29, U. S. C. A.) and in the determination of future proceedings under that Act, and on the grounds further that the order of the respondent against the petitioner as sustained by the court below deprives the petitioner of its property without due process of law and thereby violates the Fifth Amendment to the Constitution of the United States.

Statement of the Case.

On April 4, 1939, Local No. 71 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America, asserting that it represented a majority of the employees of the petitioner, Great Southern Trucking Company, in Charlotte, North Carolina, requested the petitioner to engage in collective bargaining with it (R. 115). The petitioner notified the Union that it would comply with such request (R. 116-119). Thereafter, negotiations between the petitioner and the Union continued intermittently over a period of several months. Collective bargaining conferences between representatives of the petitioner and representatives of the Union were held on May 6th, June 24th and July 29th (R. 201, 129 and 168).

On September 6th, thirty-six employees of the petitioner's place of business in Charlotte went out on strike (R. 175). The petitioner's manager in Charlotte requested them to return to their work (R. 88), but they refused to do so (R. 61 and 176).

By noon of September 8th, the petitioner had hired new men to replace those who had gone on strike (R. 177), and thereafter, in the afternoon of September 8th, notified the strikers that they were discharged (R. 61 and 177).

On December 1st, the National Labor Relations Board, respondent herein, issued a complaint against the petitioner, alleging that the strike above referred to was caused by refusal on the part of the petitioner to bargain collectively with the Union above named and that, therefore, the petitioner had violated the National Labor Relations Act in discharging the striking employees (R. 2 and 4). A hearing was held in Charlotte December 14th to 21st before a Trial Examiner duly designated by the respondent (R. 12), and on February 7, 1940, the Trial Examiner issued his Intermediate Report, finding that the petitioner had bargained in good faith with the Union, that the strike was not caused by any unfair labor practice on the part of the petitioner (R. 29), and that, therefore, in replacing the men on strike with new employees and then discharging the strikers, the petitioner had not discriminated against them in violation of the National Labor Relations Act and was under no obligation to reinstate them to their former jobs (R. 32).

On August 26, 1941, the respondent reversed the findings of its Trial Examiner and issued an order with provisions for back pay, requiring the petitioner to reinstate the men who had gone on strike in September, 1939, and directing the petitioner upon request to bargain collectively with the Union as exclusive representative of the petitioner's employees and to post notices accordingly (R. 74). The respondent also found, as had the Trial Examiner, that certain remarks disparaging to the Union had been made at various times by supervisory employees of the petitioner and ordered the petitioner to cease and desist from such practices (R. 74).

The case was taken to the United States Circuit Court of Appeals for the Fourth Circuit upon petition for review of the respondent's order (R. 257). On April 13, 1942, the

Circuit Court of Appeals rendered its decision affirming the respondent's order (R. 317).

Specification of Error.

The petitioner assigns as error the ruling of the respondent, as sustained by the court below, that the strike here in question was caused by unfair labor practice on the part of the petitioner within the meaning of the National Labor Relations Act (Section 151 et seq. of Title 29, U. S. C. A.).

ARGUMENT.

The central question in this case is whether the petitioner at the time of the strike among its employees on September 6, 1939 was at liberty to hire new employees and thereupon terminate its relations with the striking employees in such sense that it can not now be required to discharge the new employees in order to reinstate the men who went out on strike. It is clear that the answer to this question must be in favor of the petitioner if the strike was not caused by unfair labor practice on the part of the petitioner. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company,* 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381, and other decisions hereinafter cited definitely and precisely so hold.

I.

The record is definitely committed to the proposition that the cause of the strike here in question was that the union desired the petitioner's president to bargain in person for the petitioner and could obtain no assurance that he would do so—on the contrary, however, it is stipulated in the record that the union did receive such assurance.

Upon the record in this case, the occasion and the cause of the strike here in question are unequivocally defined and

fixed as follows: That during the summer of 1939, the petitioner, through local representatives in Charlotte, North Carolina, was engaged in collective bargaining negotiations with local representatives of the Union to which a majority of the petitioner's employees in Charlotte belonged; that during the course of such negotiations, the Union desired and requested that L. A. Raulerson, President of the petitioner, come to Charlotte and personally engage in the bargaining conferences with the Union; that the Union could obtain no assurance that Raulerson would do this and, therefore, called a strike. There is no testimony from any witness that the strike which is here at issue had any cause other than as set forth above (R. 107).

J. H. Fullerton, Chairman of the Union's bargaining committee (R. 90), testified (R. 81):

> "Q. So the strike was called now for the purpose of getting Mr. Raulerson here?
>
> "A. And it was for that purpose, yes.
>
> * * * * * * *
>
> "Q. And you had not been able to learn when you could get him here?
>
> "A. That is true.
>
> "Q. And the only reason for having this strike is that?
>
> "A. That is true."

Stacey R. Howie, a witness for the respondent, testified (R. 101):

> "Q. And you were in favor of a strike because they, as your representatives, told you that they could not get any definite word when Mr. Raulerson would come and negotiate with them, is that right?
>
> "A. Yes, sir."

Clayton L. Mullis, a member of the Union's bargaining committee, testified (R. 104):

> "Q. What was the final decision?

"A. To strike on the 6th, if we didn't get any definite word from Mr. Raulerson.

* * * * * * *

"Q. Well, now, the Committee didn't actually take a vote, you say, that morning in Mr. O'Brien's room?

"A. Well, I don't know that—we didn't actually have a vote, a secret ballot or anything, but it was decided that we would strike definitely by September 6th if we didn't get any word from Mr. Raulerson."

H. L. McRorie, President of the Local of the Union (R. 86) and a member of its bargaining committee, testified (R. 114 and 115):

"Q. The Committee could have called the strike off if they had come to the conclusion that was the thing to do, couldn't they?

"A. Sure.

* * * * * * *

"Q. Then if you had gotten assurance that Mr. Raulerson would have been here, you would have called the strike off, wouldn't you?

"A. Right."

But on the other hand, it is stipulated in the record that the petitioner did give and the Union did receive clear and exact assurance in writing, prior to the commencement of the strike (R. 127):

"* * * that he (Raulerson) will be here Wednesday, September 13th, at 2:30 in the afternoon and will discuss with you and any other representatives of the Union a proposed contract so that it can be then and there determined what terms can be arrived at between the Union and the Company."

Since the cause of the strike was that the Union desired L. A. Raulerson to take part in the bargaining negotiations, and since there would have been no strike if the

Union could have obtained assurance that Raulerson would do so, and since the strike would not have taken place even after it was voted and decided upon if the Union had received such assurance—then this, the central issue in the case, is necessarily resolved in favor of the petitioner by stipulation that the Union did receive such assurance.

That this assurance was sufficiently authoritative and definite is demonstrated by the fact that a few days after the strike began, the Union declared, as the respondent itself finds (R. 62), that the strike would be called off upon an assurance being given by the petitioner identical to that already given. That the time, six days, within which it was promised Raulerson would come to Charlotte to take part in the bargaining negotiations was not unreasonably long is also clearly revealed by the fact that several days later, the representatives of the Union stated that in coming to Charlotte to engage in the bargaining negotiations (R. 211):

> "* * * he (Raulerson) can take two weeks if he wants to or whatever best suits his convenience."

As the court below emphasizes (R. 325), there is conflict in the evidence as to how long before the calling of the strike it was that the Union first requested Raulerson's presence. Any and all question as to how such conflict should be resolved is, however, rendered immaterial by the uncontradicted evidence that irrespective of whether the Union had or had not waited a reasonable time after requesting Raulerson's presence, still the strike would not have occurred if the Union could have received assurance that Raulerson would come to Charlotte and take part in the bargaining negotiations. The evidence is likewise conflicting as to whether the petitioner had on the whole acted in good faith in its bargaining with the Union and as to whether the petitioner had, therefore, been guilty of unfair labor practice justifying a strike on the part of its

employees. But again, all question as to how this conflict in the evidence should be resolved is rendered wholly immaterial by the uncontradicted evidence that this strike was called because the employees wanted a certain assurance. Upon the issue here, it makes no difference that in general, the petitioner may have failed to bargain in good faith with the Union (which the petitioner sincerely denies, as hereinafter appears in detail). The point in this case is that irrespective of and despite such conduct justifying *a* strike, *this* strike was not caused by that conduct. And this strike, on the other hand, according to the affirmative and uncontradicted evidence, *would not have occurred* except for another specific and named cause, that is, failure of the petitioner to give assurance that its President would bargain with the Union—an assurance which, it must be repeated, the petitioner did, however, give and the Union did receive prior to the strike.

Thus, upon the main issue in the case: What was the cause of the strike?—the President of the Union, the Chairman of its bargaining committee and other witnesses for the respondent say:—the "*only reason*" for our strike was our inability to procure L. A. Raulerson's presence at the bargaining conferences or to obtain assurance that he would be present. This issue is then answered by the respondent's stipulation that the Union did receive such assurance before the strike began. In short, the officers of the Union testify, with no evidence whatever to the contrary, that there would have been no strike if they had received a certain assurance and that the strike occurred *because* they did not receive such assurance. The respondent has stipulated that they did receive it.

The respondent and the court below avoid the conclusion which inevitably follows simply by declaring that what the witnesses repeatedly declared and defined as the cause of the strike was in truth not the cause of the strike, and that

irrespective of what the witnesses may testify, and irrespective indeed of what the respondent may stipulate on the subject, the cause of the strike is rather to be found in whatever evidence the record may disclose of general anti-Union attitude and conduct on the part of the petitioner. The petitioner respectfully submits that when the record in a case presents and then answers the determinative issue as precisely as is true here, there is no occasion to deal with the case on the basis of general attitudes or in the misty realm of the "whole congeries of facts" (R. 326).

Every person who engaged in this strike was specifically asked (eleven of them on the witness stand and twenty-six by stipulation, R. 106): Why did you go on strike, what was the cause of your strike? Not one of them answered or intimated that the strike was caused, even in part, by any background or sequence (R. 327) or accumulation of acts or conduct constituting unfair labor practice. Each witness did testify, on the other hand, specifically, as the respondent itself stipulated (R. 106), that the strike was called and occurred because the Union wanted L. A. Raulerson to participate in the bargaining conferences and could not learn whether and when he would do so. The respondent's witnesses did, moreover, testify that this was the "*only reason*" for the strike, and *that if assurance had been given to meet this one and this particular cause, there would have been no strike.*

The language of this testimony is unambiguous and it is reiterated. As to most of the witnesses, this testimony was indeed framed and phrased for them by the respondent itself in the record stipulation of what they would have testified if they had gone on the witness stand (R. 106). Yet the respondent and the court below in effect declare:—this testimony does not mean what it says, and we will "interpret" it to mean something other than what it says. If by any means such "interpretation" be justified as to the tes-

timony of lay witnesses, still it surely remains true that stipulations drawn up and entered into by a party litigant must be given binding effect according to their terms.

There would seem to be no reason why the National Labor Relations Board, when it becomes a party litigant, should not be limited strictly by stipulations in the record as are other litigants. It would also seem to be not inconsistent with the purposes of the National Labor Relations Act that proceedings under that Act should be impressed with the same requirements of certainty and dependability which elsewhere the law surely seeks to achieve. If only a reasonable degree of such certainty be required here, then the chief issue in this case must be answered in favor of the petitioner.

The petitioner respectfully submits that the considerations hereinabove presented are absolutely conclusive of the main question in this case, but in the interest of a full discussion of all aspects of the case, the remainder of this brief is added.

II.

By reason of the foregoing, it is not now open to the respondent to contend that the strike here in question was caused by a general failure of the petitioner to bargain in good faith with the union—but even if such contention were now open to the respondent, there is no substantial evidence to support it.

A. *Local representatives of the petitioner did engage in bona fide collective bargaining with local representatives of the Union.*

During the hearing of this case, counsel for the respondent announced (R. 148):

> "Mr. Examiner, if it will save any time, I will stipulate that Mr. Garrett sat down and bargained and bar-

gained and bargained with the Union about this contract."

Mr. Garrett was superintendent in charge of the petitioner's business in North and South Carolina (R. 128). He it was who chiefly carried on the bargaining negotiations with the Union representatives, and as to his general attitude, it was testified by LeRoy H. Kirkpatrick, a member of the Union's bargaining committee (R. 96):

"Q. You never heard Mr. Garrett say a word against your Union or any other union, did you?
"A. No, sir. I can say that for him."

It is true that from the time the Union first requested the petitioner to engage in collective bargaining up to the date of the strike, only three bargaining conferences were held. This, however, is not to be charged as a fault against the petitioner any more than against the Union.

"* * * The statute does not compel him (the employer) to seek out his employees or request their participation in negotiations for purposes of collective bargaining * * *."
National Labor Relations Board v. *Columbian Enameling & Stamping Company*, 306 U. S. 292, 83 L. Ed. 660, 664.

There is no claim made anywhere in the record that the petitioner's local representatives were in any way laggard or uncooperative in arranging for and attending all conferences which were requested or suggested. J. B. Matthews, a witness for the petitioner, testified that at the first meeting (R. 232):

"Mr. Fullerton stated that there was no hurry in meeting again, inasmuch as he had four or five other proposals which he was negotiating with other lines in Charlotte, and it was their desire to bring each of

these proposals to an end at approximately the same time."

In the record (pages 128-176 and pages 201-209), there is set forth in detail the collective bargaining negotiations and dealings which took place between the representatives of the petitioner and the representatives of the Union prior to the strike. It is there shown how the proposals for a contract between the petitioner and the Union were discussed item by item (R. 21, 231 and 237); how the representatives of the petitioner definitely approved certain provisions, modified some and rejected others, entering into a full analysis and frank explanation of their position on each controverted matter. In the record (pages 180-185), there is set forth a copy of a memorandum prepared by Mr. Garrett during the course of the bargaining negotiations, showing in concise form his position on each of the items of contract proposed by the Union, as to many of which the respondent itself finds (R. 55) that the "parties reached an accord", and including tentative counter-proposals which had been approved by the petitioner's President, Mr. Raulerson (R. 187 and 205).

In this regard, H. L. McRorie, President of the Local of the Union (R. 86), testified (R. 85):

"Q. Well now, let's see now. Wasn't the contract discussed item by item?

"A. That is right, in your office.

"Q. Between the employees who were present, or the members of your committee, so that they thought and believed Mr. Garrett was doing his best to work out a contract?

"A. I think he did something.

"Q. You think that, too?

"A. But I don't think he had a right to sign it.

"Q. Well, he said he didn't, didn't he?

"A. That is right.

"Q. But he said he was doing his best to work out one that would be signed by Mr. Raulerson, didn't he?
"A. That is right.
"Q. And you believed that he was?
"A. Yes."

LeRoy H. Kirkpatrick, a member of the Union's bargaining committee, testified that (R. 95):

"* * * It looked to us fellows that Mr. Garrett * * * was trying to settle something * * * and he approved of a lot of things in there * * *."

H. W. Houston, also a member of the Union's bargaining committee, testified (R. 87):

"Q. All right. Tell us in your own words what happened at that conference?
"A. Well, we went over the agreement there in detail and Mr. Garrett agreed to practically everything in the contract, with the exception of the closed shop and the seniority and the minimum wage scale. He did not agree with us on that, and there were a few changes in there that we did agree to, a few minor changes * * *."

Thus it is clear that the local representatives of the petitioner did genuinely and in good faith make an effort to arrive at an agreement with the Union.

B. *The petitioner was at liberty to act through local representatives in bargaining with the Union and was under no obligation to bargain solely through its President.*

There is, of course, nothing in the National Labor Relations Act requiring a corporate employer when engaging in collective bargaining to do so through any particular official. Nor would it seem reasonable for either side in such negotiations to insist upon the presence of any certain person as a prerequisite to collective bargaining. The petitioner here

certainly could not have stipulated as a condition to its engaging in bargaining that the President of the International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America should present himself in Charlotte and participate personally in such negotiations. As is said by the Second Circuit Court of Appeals in *National Labor Relations Board* v. *Hopwood Retinning Company,* 98 F. (2d) 97, 101 (C. C. A. 2nd):

> "The Board is without power to say what person may conduct the negotiations."

The National Labor Relations Act, Section 2(2), declares that:

> "* * * The term 'employer' includes any person acting in the interest of an employer, directly or indirectly * * *."

A corporation, of course, can act in no other way than through representatives. In the House Committee Reports of June 10, 1935, relating to the National Labor Relations Act then under consideration in Congress, it is said:

> "* * * But it is clear that corresponding to the right of employees to be free from interference, etc., by their employer in their organizational activities, is the right of the other party to the negotiation, the employer, to be free in his designation of representatives for that purpose."

In the case of *National Labor Relations Board* v. *P. Lorillard Company,* 117 F. (2d) 921, 924 (C. C. A. 6th), the Court points out how local representatives may be:

> "* * * better able to understand mutual needs and seasonably to negotiate fair contracts than representatives far distant. * * *"

The individual who principally carried on the negotiations for the petitioner, Edward H. Garrett, was, as men-

tioned above, superintendent in charge of the petitioner's business in North Carolina and South Carolina (R. 128). Although he did not have final authority to sign a contract for the petitioner, he was performing a normal, reasonable and indeed a necessary function in the bargaining process in "ironing out" and "sifting down" the various proposals so that terms could be arrived at which would be finally acceptable to both sides (R. 21, 195, 196, 214 and 231). There is no evidence and no reason to suppose that whatever terms of contract its local representatives might have recommended, the petitioner would not have accepted.

The bargaining conferences did not proceed under any misapprehension as to the authority of the petitioner's representatives. It was clearly understood that they could not sign a contract without final approval from the petitioner (R. 21, 53, 54, 83, 130, 194 and 231). But this certainly did not render their efforts to work out a contract worthless or nullify the bona fides of the bargaining negotiations.

For that matter, it appears that the representatives of the Union who made up its negotiating committee had no more authority to make a final contract than did the petitioner's representatives. H. L. McRorie, President of the Local Union, testified (R. 86):

> "Q. But until the contract has been submitted to the employees, you and the committee had no authority?
> "A. No.
> "Q. How?
> "A. No.
> "Q. No what?
> "A. No authority to sign it until the Local Union of the men approved that."

LeRoy H. Kirkpatrick, a member of the Union's negotiating committee, testified to the same effect (R. 95), and

McRorie further stated that it was his understanding that not only the membership of the Local Union but the headquarters of the Union in Philadelphia as well had the power of approval or disapproval with respect to any contract terms worked out by the Union's Local negotiating committee (R. 113).

C. *Local representatives of the Union readily engaged in collective bargaining with local representatives of the petitioner and took no stand that the presence of the petitioner's President was indispensable to the negotiations until six days before the commencement of the strike.*

Irrespective of the fact that the Union's representatives had no right and no reason to insist upon the presence of the petitioner's President as indispensable to bona fide collective bargaining between the petitioner and the Union, they did not do so until six days before the strike was commenced. Up until August 31st, they negotiated and dealt with the local representatives of the petitioner without at any time putting the petitioner on notice that they would regard Raulerson's presence as essential and a condition precedent to further bargaining—assuming for the moment that they could with legal effectiveness have given any such notice. Garrett testified (R. 188):

> "Q. Now, then, do you want to change your testimony about the first time you knew about it being dated August 31, 1939?
>
> "A. No, the first demand ever made on me to have Mr. Raulerson up here to bargain, or for any purpose, was on August 31st."

This is controverted in a vague and confused fashion, but the record convincingly supports Garrett's testimony. The Union's original request for collective bargaining, addressed to Mr. Raulerson, suggested conferences either

with him "or" his "representatives" (R. 116). In replying to this letter, Raulerson stated that he was referring the matter to local representatives of the petitioner in Charlotte. Whereupon, J. H. Fullerton, Secretary and Treasurer of the Local Union and Chairman of its negotiating committee, registering no objection to carrying on the collective bargaining negotiations with such local representatives, but on the other hand clearly accepting them as the persons with whom the Union committee would deal (R. 80, 82 and 83), wrote to J. R. Matthews, then superintendent of the petitioner's business in North Carolina (R. 117):

> "* * * for the purpose of arranging with you and your attorney, a date and time that our committee can meet with you for the consideration and negotiation of collective bargaining, by and between your Company and the Local Union No. 71, Charlotte Branch of the International Brotherhood of Teamsters, Chauffeurs and Stablemen and Helpers."

At the first meeting on May 6th, discussions were entered into and proceeded with no point whatever being made of the fact that Raulerson was not present (R. 21). As to the next meeting on June 24th, Garrett testified (R. 153—see also 195):

> "Q. All right. What was said by the committee or the other representatives of the Union by way of objection to the fact that Mr. Raulerson was not present at this meeting engaging in these negotiations?
> "A. Nothing whatsoever."

The respondent says (R. 54) that at this meeting, Fullerton, Chairman of the Union's negotiating committee, "asked that Raulerson come to Charlotte to negotiate". This is contrary not only to Garrett's explicit testimony quoted above (R. 153), but also to the testimony of Fuller-

ton himself to the effect that the first call for Raulerson by the Union representatives was at the third meeting with Mr. Garrett (R. 83). The respondent further finds (R. 55) that after the June 24th meeting, Fullerton, learning that Raulerson would be in Charlotte on July 20th requested that a conference between him and the Union's committee be arranged. This finding is contrary not only to the testimony of Garrett (R. 197), Houston (R. 93), a member of the Union's committee, Fullerton himself (R. 82), Chairman of that committee, and the conclusion of the respondent's Trial Examiner (R. 55), but also strangely ignores the admitted fact that when Raulerson did come to Charlotte on July 20th, the committee did not mention to him any desire to meet with him either on that date or at any later time, although he engaged in conversation with a member of the committee. H. W. Houston testified (R. 85):

> "Q. All right. Now you say that despite all your efforts, you and the Union committee and employees who belonged to the Union, you never were able to get Mr. Raulerson here to talk and deal with them, never were able to get in touch with him to deal with the Union, and for that reason you went on strike?
>
> "A. That is right.
>
> "Q. And yet you say you talked to Raulerson on July 20th?
>
> "A. That's right.
>
> "Q. Didn't you?
>
> "A. That's right.
>
> "Q. You did not mention yourself any contract, did you?
>
> "A. No.
>
> "Q. Didn't tell him that you wanted to deal with him, did you?
>
> "A. No.
>
> "Q. Didn't tell him the committee wanted to see him or meet with him?
>
> "A. No."

And again (R. 91):

> "Q. I am talking about did any member of the committee say to Mr. Raulerson, 'Mr. Raulerson, I want to speak to you here, we want to deal with you and negotiate with you about this thing, we have not been able to get hold of you'—anybody say that to him?
> "A. No, not that I know of.
> "Q. You talked to him?
> "A. I spoke to him, yes, sir.
> "Q. Well, you talked to him for a minute or two?
> "A. Yes, I talked to him."

Garrett and Raulerson testified to the same effect (R. 167 and 222-223). It is, moreover, to be noted that the respondent does not claim that the Union's committee at the next meeting on July 29th registered any complaint as to Raulerson's having failed to meet with them when he was in Charlotte on July 20th (R. 22).

At the meeting on July 29th, the third and last of the conferences prior to the strike, the issues of the "closed shop" and "unqualified seniority" came definitely into prominence as the chief matters of difference between the negotiators. The Union representatives at the two previous conferences had insisted and at this conference continued to insist that these provisions must be included in the contemplated contract (R. 54, 55, 92, 95, 168, 202 and 204). The petitioner's representatives on the other hand had stated and continued to maintain that the petitioner was not willing to include such provisions in the contract (R. 54, 55, 57, 91, 92, 94, 140, 168, 204 and 231), except, however, as to a provision for "qualified seniority" which they declared would be acceptable to the petitioner (R. 205). Discussion then arose as to Raulerson's coming into the negotiations. Whiteford S. Blakeney, a witness for the petitioner, reviewed this discussion as follows (R. 205-206):

> "We then got into a discussion again of the closed shop and absolute seniority, these being provisions of

the contract which were discussed more than any other in all the conferences.

"We asked the Union representatives if they still insisted on the closed shop and the absolute seniority provisions being part of any contract they signed.

"They said, 'Yes', they did, that they didn't think a contract would be worth anything if it didn't have the closed shop provision in it.

"I then proceeded to try to show to them where I thought a contract would be worth a great deal to them that had some of the other provisions in it that these proposals had, even though such contract didn't have in it the closed shop.

"They stated, however, that they still wanted and insisted upon those provisions being in the contract.

"I then said, 'Well, Mr. Raulerson has said definitely he won't agree to those.'

"There was then mention made of Mr. Raulerson's sitting in on the negotiations, and I then said, 'Well, what is the use of Mr. Raulerson's coming here at this point if you gentlemen say you are not going to sign a contract that does not have closed shop and absolute seniority in it, and Mr. Raulerson says, on the other hand, that he isn't going to sign a contract that does have it in?'

"They then said, 'Well, we haven't heard him say that.'

"I said, 'Well, I am telling you that he has said it.'

"They said, 'Well, we want to see it in writing.'

"Mr. O'Brien: You mean the whole committee or who?

"The Witness: I should say that Mr. —— according to the best of my recollection, Mr. Fullerton said that and Mr. Kirkpatrick and Mr. Houston chimed in they wanted to see it, too.

"That meeting came to a conclusion about that time with the understanding and the agreement that I was to write to Mr. Raulerson and get him to say definitely whether he wanted, and whether he would or would not agree to a closed shop and absolute seniority."

This last conference ended then not with any understanding that Raulerson would come to Charlotte and take part in the negotiations nor with any understanding that he would be requested to do so, but with the understanding that he would write a letter definitely stating what he would agree to with respect to the issues of the closed shop and seniority. Blakeney's testimony to this effect is fully substantiated by Garrett (R. 170) and by the respondent's witness, Houston (R. 92), and both the Trial Examiner (R. 23) and the respondent find that (R. 57):

> "The conference ended with the understanding that Blakeney would write to Raulerson requesting him to state his position in writing."

As to whether there should be further and future negotiations if Raulerson should reply in the negative on the closed shop and seniority issues and as to whether in that event the Union committee desired Raulerson's presence, there was no understanding. As to this Blakeney testified (R. 206):

> "The question as to whether, if he did say, 'I won't agree to those two provisions', as to whether if and after he said that, there was still to be further negotiations on other phases of the contract, and whether Mr. Raulerson's presence was desired to negotiate on those other phases, was left hanging in the air."

Garrett testified to the same effect (R. 198) and the respondent finds that (R. 57):

> "No arrangement was made as to what would be done thereafter."

Blakeney did write to Raulerson (R. 206), requesting a definite statement from him in writing as to his position respecting "the two sections of the contract mentioned above" (R. 121). On August 10th, not having received a

reply from Raulerson, Blakeney wrote to him (R. 122). This letter stating that Fullerton had called asking whether a reply had yet been received from Raulerson shows that what all parties were expecting in regard to Raulerson was a writing from him—not his presence. Raulerson testified (R. 219) that his delay in answering was due to the fact that he was away from his office a great part of the time. On August 16th, he did reply, saying definitely as to the issues on which he had been asked to state his position (R. 123):

> "* * * I cannot agree to these provisions as a part of the contract."

This letter further makes it clear that Raulerson was unaware of there being any demand for his presence in Charlotte for he says (R. 123):

> "* * * If they (the Union representatives) desire, I will make arrangements to come to Charlotte and discuss the matter with them."

This substantiates the evidence hereinbefore set forth that there had been no such demand, and certainly so when it is seen that this letter was read to the Chairman of the Union's negotiating committee over the telephone and a copy of it mailed to him (R. 124), so that the Union's committee necessarily knew that Raulerson was unaware of any demand for his presence. But after being thus informed, the Union representatives made no effort to communicate with Raulerson himself nor did they communicate in any way again with any representative of the petitioner until August 31st, and this they do not deny. Garrett testified (R. 198):

> "Q. After that, were you ever asked to meet again by any representative of the committee, were you ever asked to meet with them?

"A. After July 29th?
"Q. Yes.
"A. No, sir.
"Q. What was the first information or notification you ever had from any representative of the Union after July 29th to the effect that they wanted to move on and proceed after the receipt of the letter from Mr. Raulerson?
"A. Well, the only thing I heard after that was on August 31st, when Mr. McRorie came into my office."

This is corroborated by the fact that on September 6th, Blakeney wrote a letter to Fullerton and McRorie reviewing the status of the bargaining negotiations and therein stating that neither he nor Garrett had "heard anything from Mr. Fullerton or any other representative of the Union" between August 24th and August 31st (R. 125).

With respect to the entire period of the bargaining negotiations down to August 31st, the Trial Examiner found (R. 28):

"A careful weighing of the testimony and examination of the documents presented in evidence discloses that at no time prior to August 31, 1939, did the Union, through any of its members, insist upon the presence of Raulerson in Charlotte for the purpose of negotiating a contract. * * * On the occasion of the conference of July 29th, hereinabove described, Fullerton testified that the Union representatives insisted that Blakeney request Raulerson to come to Charlotte, but the testimony of the other union representatives is extremely vague and unconvincing as to this point. Both Blakeney and Garrett testified that the Union representatives accepted Blakeney's counter proposal, that Raulerson be asked to express in writing his opinion of the closed shop and seniority provisions, rather than that Raulerson be asked to come to Charlotte at that time. The ensuing correspondence between Blakeney and Raulerson, Fullerton's telephone calls to Blakeney and Blakeney's letter to Fullerton on August 24, 1939,

with Raulerson's letter as an enclosure convincingly confirm the testimony of Blakeney and Garrett on this subject. The failure of the Union on July 29th to complain of the respondent's failure to meet with its representatives when in Charlotte on July 20th is indicative of the fact that at this stage of the negotiations, contrary to the Board's contention, the Union was not insisting on Raulerson's presence."

D. *Upon demand that the petitioner's President personally negotiate with the Union, the petitioner, whether obligated to do so or not, promptly gave assurance, as has been hereinabove pointed out, that such demand would be complied with.*

On Thursday, August 31st, McRorie, President of the Local of the Union, went to Garrett's office and suddenly and peremptorily demanded that Raulerson come to Charlotte and personally negotiate with the Union committee by Saturday, September 2nd. Garrett, who at the moment was preparing to go to Knoxville, Tennessee, testified that he said (R. 172):

"That I did not know whether it would be possible for Mr. Raulerson to so arrange his affairs to be here on Saturday, it was not sufficient time, it wasn't reasonable, and Mr. McRorie said, 'Well', he said, 'Saturday night at one o'clock is the deadline'.

"I said, 'Mr. McRorie, I am all packed up ready to go to Knoxville and I am going over there for the purpose of locating a terminal if possible for the Company at Knoxville, I do not want to leave here if I know there is going to be any difficulty'.

"I said, 'I think you should be reasonable about this thing, you may not know of it, Mr. Raulerson can't jump up on a moment's notice and come to Charlotte and I think we should be given more time to arrange his presence here' * * *"

Whereupon, McRorie "thought a moment" and replied (R. 172):

> "We will set Wednesday night at six o'clock as the deadline."

Garrett then said (R. 172):

> "* * * 'I will communicate or get in touch with Mr. Raulerson and when I return to my office—' Monday was Labor Day, the 4th, I said, 'I will be back in the office on the morning of the 5th; in the meantime, I will communicate with Mr. Raulerson and definitely tell you when he will be able to be here'."

On Tuesday morning, September 5th, having returned to his office, Garrett says (R. 173):

> "I told Mr. McRorie that I had communicated with Mr. Raulerson and he had definitely informed me that he would be in Charlotte the 9th of September, or preferably the 11th, that he was in some court proceedings and it would be impossible for him to get here before that date, that he would be here though on the 9th, or if it was agreeable to them, be here on the 11th, for the purpose of going into the contract and discussing it with any Union officials or anyone else of the Union."

Whereupon, McRorie replied (R. 173):

> "'Well, Wednesday night at six o'clock is the deadline'."

Garrett says (R. 173) he asked McRorie to state what he meant by "deadline", but that McRorie would only reply (R. 174):

> "'Well, you can give him three guesses what it means'."

Raulerson says (R. 223) that the impression he had received was that "deadline" meant "deadline for sign-

ing a contract". At any rate, Garrett immediately tried to reach Raulerson in Jacksonville, Florida, over the telephone but was not able to do so until the next morning, that is, the morning of September 6th. Garrett testified as to this conversation (R. 174):

> "He (Raulerson) said it would be a physical impossibility for him to get to Charlotte by six o'clock, that he had previous engagements necessitating his presence. He said, however, 'I told you that I could be there on the 9th, or preferably the 11th; it now develops that I will be tied up, my presence will be necessary in the court litigation and I can't get there before the 13th, but you can definitely make any appointment with the Union committtee or any members of the Union that I will definitely be there on the 13th, September 13th, and go into a conference, discussion, with them and see what agreement or arrangement can be made'."

Raulerson testified as to the court hearings which were requiring his presence in Jacksonville at that time (R. 220):

> "Q. How important were those two cases to you?
> "A. They were so important that if I had lost them, this hearing would have been unnecessary. It went to the very foundation of control of my Company.
> "Q. Were you a witness in those cases?
> "A. A very necessary one, absolutely essential one."

The information from Raulerson was conveyed to McRorie and Fullerton by telephone and by letter, the latter being delivered (R. 61 and 199) by messenger to McRorie at 12:22 P. M. and to Fullerton at 12:50 P. M. on the same day, that is, September 6th. No further communication took place between the petitioner and the Union until the strike was commenced at six P. M. on the same day.

The respondent's Trial Examiner (R. 29):

> "* * * finds that prior to and including September 6th, the respondent bargained in good faith with the Union, and that Raulerson's failure to come to Charlotte on September 6, 1939, and enter bargaining negotiations was not a refusal to bargain collectively with the Union."

The information conveyed to the Union's representatives on September 6th was definite and unequivocable. The letter to them read in part as follows (R. 126):

> "Mr. Garrett says that Mr. Raulerson authorized him to make an appointment with you gentlemen and with any other representatives of the Union who wished to be present to meet in our office on Wednesday afternoon, September 13th, at 2:30 P. M. and that then and there, he, Mr. Raulerson, would be present and would discuss any and all matters pertaining to a contract which the Union or any of its representatives might wish to discuss and that he would then and there take up any matters whatever which you gentlemen or the Union may have been wishing to discuss with him. You will recall that the writer has just talked with each of you over the telephone and has informed you of this telephone conversation with Mr. Raulerson this morning and of his definite statement that he will be here on Wednesday, September 13th, at 2:30 in the afternoon, as stated above.
>
> "We are writing you thus in detail to keep the history of this matter straight and also now to inform you of Mr. Raulerson's definite statement that he will be here Wednesday, September 13th, at 2:30 in the afternoon and will discuss with you and with any other representatives of the Union a proposed contract so that it can be then and there determined what terms can be arrived at between the Union and the Company."

If "inability of the Union and its representatives to obtain definite information through local officials or representatives of the Company as to when and how such col-

lective bargaining with the said L. A. Raulerson could and would be arranged" was the cause of the strike here in question, as the respondent's witnesses have all testified (R. 107), then the stipulation by the respondent (R. 199) and the finding by the respondent (R. 61) that the very information desired was communicated by local officials and representatives of the Company to the Union prior to the commencement of the strike are absolutely decisive. The Trial Examiner could not avoid such conclusion and the "finding" of the respondent to the contrary in the face of the record is, the petitioner respectfully submits, a sheer tour de force.

E. *Upon its employees going on strike and refusing to work, the petitioner hired new employees in their places and discharged those on strike—and this the petitioner was at liberty to do, the strike not having been called by any unfair labor practice on the part of the petitioner.*

When the strike commenced, Garrett "tried to get all the men to go back to work," but "they refused to do so." He so testified (R. 175-176), as did Houston (R. 88), a member of the Union's negotiating committee, and the respondent itself so found (R. 61). Thereupon, the petitioner immediately began to hire new employees to fill the jobs left vacant by the striking employees. As to this, Garrett testified (R. 176):

> "Q. What did you do from that time on over the course of the next hours with respect to hiring any other men?
>
> "A. He immediately started to hire other men. I personally——
>
> "Q. Why?
>
> "A. Well, we had to run those trucks; the nature of the business demanded that we run the trucks, and the I. C. C. requirements are that we run these trucks and if the business was to continue, if the Company

was to continue in business and the operation was to continue, it was necessary to hire men to run those trucks."

Garrett testified that by the morning of September 8th, the positions of all of the strikers had been filled with new employees (R. 176):

"Q. By when had you hired new men to take the places of the men who refused to come to work?
"A. You mean the final date?
"Q. Yes?
"A. We had filled the positions, Mr. Pender advised me, on the morning of the 8th, that he had filled the positions, hired new men for them."

The Trial Examiner (R. 25) and the respondent (R. 61) find that (R. 25):

"Between six P. M. on September 6th and prior to the conference on the afternoon of September 8th, the places of all the striking employees except one were filled by new men, and the respondent resumed normal operations."

Thereafter, as the respondent finds (R. 61), and on the same day, a notice was posted and registered letters were sent by the petitioner to the strikers, informing them that they were discharged. As to this notice and these letters of discharge, Garrett testified (R. 198):

"Q. All right. Now tell us, Mr. Garrett, once more, why you discharged those thirty-six men, I believe it was.
"A. All right. The nature of this business, trucking business, if it is continuous operation and survives, we have got to run those schedules and operate those trucks, and men had been hired for the jobs that were vacated by the men out on strike."

And again (R. 199):

"Q. Well then, perhaps you can explain this notice; maybe I do not understand the notice: It says:

'To all men who have left their jobs and gone out on strike:

'You are hereby notified that you are discharged.'

"A. Well, we had hired men for those positions, and I notified them all by that means and by letter which would give them—knowing that I wasn't holding any positions open for them, give them opportunity to get another job."

Shaw E. Pender, who sent out the letters of discharge, testified (R. 244):

"Q. Why did you send those letters?

"A. Because the men had quit the jobs and refused to come back, we had already hired new men to fill their places.

"Q. Now is that true as to High Point, the High Point men as well as the Charlotte men?

"A. Yes, sir."

And again (R. 246):

"Q. Now you maintain that these men quit their jobs, do you?

"A. They did, and refused to come back to work.

* * * * * * *

"Q. Well then, why did you write them and tell them that they were discharged?

"A. I didn't want them to think that their jobs were open for them, because we had hired other men and filled their jobs."

On September 13th, Raulerson came to Charlotte and met with representatives of the Union but entered into no discussion other than to make a statement reading in part as follows (R. 127):

"The management of the Great Southern Trucking Company has dealt with its employees and with the Union which represented its employees in the utmost fairness and good faith. In its relations and dealings with its employees, the Company has done even more than the law or reasonableness requires.

"Despite this, a considerable number of the men saw fit to quit their jobs and go out on strike last Wednesday, September 6th. If the Company was to stay in business and if its operations were to go on, it was necessary that new men be hired to replace the men who had quit their jobs. We have replaced the men who left their jobs and at the present time the Company does not have any jobs open.

"If any of the men who left their work and went out on strike nor or hereafter desire to go back to work for the Great Southern Trucking Company, we will be glad to consider their applications if and when vacancies occur, and we will do so impartially and without any discrimination against the men who have gone out on strike and without being influenced by the fact that they belong to the Union."

The question now is: Will compliance with this assurance fulfill the petitioner's legal obligations, or must the petitioner discharge its present employees and reinstate the former employees and pay them back wages? Surely upon the record set forth and analyzed above, the answer to this question is—"No."

The respondent's Trial Examiner, after (R. 28) "a careful weighing of the testimony and examination of the documents presented in evidence" concluded that the strike (R. 29) "was not caused by unfair labor practices of the respondent"; that (R. 32):

> "* * * the respondent was under no obligation to reinstate the striking employees inasmuch as their positions had already been filled."

And that (R. 32):

> "* * * the respondent has not discriminated against the striking employees in regard to hire or tenure of employment."

Such conclusion in this case is supported and indeed compelled by clear and repeated judicial decision. The Supreme Court of the United States in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381, declared in terms that cannot be misunderstood:

> "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike', it does not follow that an employer, guilty of no act denounced by the Statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them."

This principle the Court emphasizes and reiterates:

> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them."

This proposition is grounded in common sense and necessity. Were the law otherwise, the "economic contest" between employer and employee would become no contest. For if, in the event of a strike, the employer is powerless to hire other employees, except upon the understanding that such new employees must quit whenever the strikers change their minds, then truly the employee would be

master of the employer-employee relationship and possessor of a paralyzing power over industry.

In the case of *National Labor Relations Board* v. *Columbian Enameling & Stamping Company,* 306 U. S. 292, 83 L. Ed. 660, the Supreme Court further says:

> "The Board's order is without support unless the date of the refusal to bargain collectively be fixed as on July 23, 1935. The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis for an order by the Board directing, as of that date, the discharge of any employees and their replacement by strikers."

This necessarily follows from the principle laid down in *National Labor Relations Board* v. *Mackay Radio & Telegraph Company, supra,* and is express authority for the refusal of the petitioner on September 13th to engage in collective bargaining with the Union, which at that time made no claim to representing the men then at work for the petitioner. Directly to the same effect are the decisions of the Supreme Court in *National Labor Relations Board* v. *Sands Manufacturing Company,* 306 U. S. 332, 83 L. Ed. 682, and of this Court in *Standard Lime & Stone Company* v. *National Labor Relations Board,* 97 Fed. (2d) 531 (C. C. A. 4th).

In situations very closely corresponding to the instant case, the Circuit Courts of Appeal have had no hesitancy in their rulings. In *C. G. Conn, Ltd.,* v. *National Labor Relations Board,* 198 Fed. (2d) 390, 398 (C. C. A. 7th), the Court says:

> "Within a few days after the discharges, petitioner engaged the services of persons to take the place of

those whom we now refer to as the striking employees. Its action in this respect is not subject to criticism * * * It seems settled that at that time, petitioner was under no obligation to discharge the men who had been employed to take the place of the strikers merely to make room for them."

To the same effect are the cases of *Black Diamond Steamship Company* v. *National Labor Relations Board,* 94 Fed. (2d) 875 (C. C. A. 2nd), and *Wilson & Company, Incorporated* v. *National Labor Relations Board,* 124 Fed. (2d) 845 (C. C. A. 7th). Such also is the decision in *National Labor Relations Board* v. *Lightner Publishing Corporation,* 113 Fed. (2d) 621, 625 (C. C. A. 7th), where the Court says:

"We are of the opinion that there is no substantial evidence to support a finding that respondent has refused to bargain collectively, within the meaning of the Act, prior to the close of the meeting of October 7. Moreover, there was no basis in the evidence for a finding that the strike of September 30 was caused by respondent's refusal to bargain in good faith. * * * The strike of September 30 was the result of a labor dispute and was not caused by an unfair labor practice. * * * (R. 626). Under the authority of the Mackay case, supra, the respondent's right to employ men to take the place of the striking employees was unqualified until the commission of the unfair labor practice of October 25, 1937. Consequently, any order of reinstatement predicated upon an unfair labor practice cannot require dismissal of men who were employed prior to the unfair labor practice."

The decision in *Wilson & Company* v. *National Labor Relations Board,* 120 Fed. (2d) 913, 923 (C. C. A. 7th), is to the same effect.

"Shortly after April 24 it (the employer) commenced the hiring of new employees, which it had a right to do

> * * * In its brief, the Board thus recognizes petitioner's right in this respect: '* * * This petitioner had, of course, the right to do until July 3, since theretofore the strike had been neither caused nor prolonged by its unfair labor practices. * * *' The record does not disclose the number of petitioner's employees on July 3, but assuming that they were the same as on July 26, it thus had 139 new employees which it was not obligated to discharge in order to make room for the strikers."

None of the foregoing authority is contradicted or affected by Section 2(3) of the National Labor Relations Act, which provides that one "whose work has ceased as a consequence of or in connection with any current labor dispute" is still an employee. The answer to this provision is that when an employer, guilty of no unfair labor practice causing a strike, has replaced strikers with new employees, there is no longer "any current labor dispute" or else if the strikers remain employees, their only right against the employer is that they shall not be discriminated against if and when vacancies in jobs occur. In *National Labor Relations Board* v. *Brashear Freight Lines,* 119 Fed. (2d) 379, 383 (C. C. A. 8th):

> "'* * * A minority of the employees, who strike because the employer refuses to bargain with their representative, do so at their peril insofar as compulsory reinstatement is concerned. Under the finding of the Board that the representative was of a minority only of the proper unit and under the undisputed evidence that the sole reason of the strike was the failure to bargain with such representative, there was no substantial evidence to sustain that portion of the order requiring reinstatement or preferential listing of these striking employees."

Yet these strikers being still "employees" under Section 2(3) of the National Labor Relations Act, would be en-

titled to reinstatement unless Section 2(3) is to be qualified as pointed out above. That it is so qualified is the necessary holding of all the decisions quoted above.

The Circuit Court in *Jeffery-DeWitt Insulator Company* v. *National Labor Relations Board,* 91 Fed. (2d) 134 (C. C. A. 4th), and also in *Standard Lime & Stone Company* v. *National Labor Relations Board,* 97 Fed. (2d) 531 (C. C. A. 4th), held that although the employer as of a certain date in each of these cases had been guilty of no unfair labor practice causing a strike among its employees, still up to such date, the relation of employer and employee had not been terminated. In these decisions, however, the elements essential to such termination of the employer-employee relation are clearly indicated and all those elements are specifically present in the case now before the Court. In *Jeffery-DeWitt Insulator Company* v. *National Labor Relations Board, supra,* the Circuit Court quotes with approval the language of *Michaelson* v. *United States,* 291 Fed. 940, 942, that:

> "* * * A strike does not of itself terminate the relation of employer and employee. * * * In the absence of any action other than above indicated, looking to a termination of the relationship, they are entitled to rank as 'employees' with the adjective 'striking' defining their immediate status."

In *Standard Lime & Stone Company* v. *National Labor Relations Board, supra,* the Circuit Court pointed to the crucial fact that at the time there in question the employer had "not secured a full complement of workers" and had merely" * * * announced that it would not consider any workers as an employee who failed to return to work on June 13th." In the instant case, the petitioner did, as hereinabove set forth, hire new employees to take the places of the strikers and there was then and thereafter no ambiguity in the position of the petitioner with respect to the

strikers, such as is referred to in the language quoted by the Circuit Court in *Jeffery-DeWitt Insulator Company* v. *National Labor Relations Board, supra:* "* * * the employer remaining ready to take them back on terms to which he shall agree." For the petitioner here, immediately after replacing the striking employees, posted a notice and sent them registered letters informing them that they were discharged, so that they would not "think that their jobs were open for them" (R. 246).

Under all the authority bearing upon the subject as applied to the record before the Court, it is respectfully submitted that the respondent's order as to reinstatement of the petitioner's former employees should be reversed.

It is of fundamental significance in this case that the facts which necessitate this conclusion are established by stipulation and documentary evidence and are not in any sense left within the realm of conflicting testimony by opposing witnesses. It is familiar enough that upon appeal from administrative tribunal, the credibility of witnesses and the weighing of their testimony are not matters for the Court, and the findings of the administrative body ordinarily, therefore, may not be disturbed, even though the Court may disagree with such findings (see *Martel Mills Company* v. *National Labor Relations Board,* 114 F. (2d) 624, 627 (C. C. A. 4th). But this is not such a case. This Court is, of course, at liberty to reverse "findings" of the respondent when the facts are established contrariwise by stipulations and undisputed documents.

In this case it should also be borne in mind, as emphasized by Clark, J., in a dissenting opinion in *Burk Brothers* v. *National Labor Relations Board,* 117 F. (2d) 686, 688 (C. C. A. 3rd), that the respondent's Trial Examiner, "who by definition saw and heard the witnesses" and observed them and "their demeanor" (R. 48), rendered a decision some two months thereafter in favor of the petitioner on

the central issue here involved. On the other hand, more than a year and a half later, the respondent, which equally by definition did not see and hear or observe the witnesses, reversed its Trial Examiner. In such situation, as said by the Court in *A. E. Staley Manufacturing Company* v. *National Labor Relations Board*, 117 F. (2d) 868, 878 (C. C. A. 7th):

> "• • • While the report of the Examiner is not binding on the Board, yet where it reaches a conclusion opposite to that of the Examiner, we think the report of the latter has a bearing on the question of substantial support and materially detracts therefrom."

The respondent when following its Trial Examiner is wont to call attention to the fact that he had superior and first-hand opportunity to evaluate the evidence. The petitioner in the present instance would like to call attention to the same fact.

It is, moreover, quite apparent in this case that whereas the witnesses for the petitioner were definite and consistent in their testimony, the witnesses for the respondent were vague, confused and contradictory. To illustrate: McRorie, President of the Local of the Union and a member of its negotiating committee, and Kirkpatrick, likewise a member of the negotiating committee, testified (R. 83 and 95) that they learned as early as the bargaining conference of June 24th that Garrett did not have final authority to sign a contract for the petitioner. Whereas, Houston, likewise a member of the Union's negotiating committee, testified (R. 93) that up until July 20th:

> "• • • We were under the impression that Mr. Garrett would have the authority to sign an agreement."

Fullerton, Secretary and Treasurer of the Union and Chairman of its negotiating committee, testified (see R. 55):

"* * * that when he heard Raulerson was to be in Charlotte (on July 20th), he requested Garrett to arrange a conference. * * *"

Houston, on the other hand, testified that (R. 93):

"* * * From July 1st to July 20th no effort was made to get Mr. Raulerson up here."

Indeed, Fullerton's testimony (see R. 55) that he tried to arrange a conference with Raulerson for July 20th is contradicted by his own later testimony (R. 82) that he "made no effort to get in touch with Mr. Raulerson" until "the third meeting with Mr. Garrett" on July 29th. Fullerton's reference to a "third meeting with Mr. Garrett" is likewise inconsistent with the facts, for it is admitted that there were only two meetings with Mr. Garrett, one on June 24th and another on July 29th. McRorie expands on this by referring (R. 85) to a "fourth meeting" and says that this "was about next to the last meeting," thus running the total up to five; whereas, it is conceded by the respondent that there were in fact only three meetings: on May 6th, June 24th and July 29th. The accuracy of the testimony presented by the respondent's witnesses is aptly characterized by the unique phrase of McRorie (R. 113):

"Generally speaking, I don't remember."

The respondent itself is by no means immune from such shortcoming. It declares in its Decision and Order (R. 44) that the petitioner's answer in the case alleges that the petitioner "* * * refused to bargain with the Union * * * for the reason that it would have been illegal to do so." A reading of the petitioner's answer, on the other hand, will show that it contains no such allegation or statement.

The respondent has found in this case (R. 50) that supervisory employees of the petitioner at various times during

1939 made "disparaging remarks about the Union," thereby discouraging membership in the Union and interfering with, restraining and coercing the employees in the exercise of the rights guaranteed to them by the National Labor Relations Act. It is first to be noted that such supervisory employees and other witnesses as well denied that such remarks were made, but the respondent experiences no difficulty in "finding" with almost monotonous reiteration that the witnesses reporting such remarks were telling the truth and that the witnesses denying them were not. To be sure, the respondent, in the words of *National Labor Relations Board* v. *Auburn Foundries, Incorporated,* 119 F. (2d) 331, 333 (C. C. A. 7th):

> "* * * apparently has the right to place its stamp of approval upon its own witnesses as against the world, if it so desires."

But its marked tendency to do so should be noted, and the petitioner desires to enter its protest against the present manifestation of that tendency. As said by Dean Roscoe Pound in American Bar Association Journal, Vol. 27, p. 667, November, 1941, this is:

> "* * * a tendency to identify in advance one side of a controversy with the public interest and to find the facts accordingly."

Practically all of the disparaging remarks here alleged to have been made by the respondent's supervisory employees were purely expressions of opinions and views arguendo. As declared in *National Labor Relations Board* v. *Union Pacific Stages, Incorporated,* 99 F. (2d) 153, 178 (C. C. A. 9th):

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a Union."

And as stated by the Court in *National Labor Relations Board* v. *Mathieson Alkali Works,* 114 F. (2d) 796, 802 (C. C. A. 4th):

> "But mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterance of individual views, not authorized by the employer, and not of such character or made under such circumstances as to justify the conclusion that they are an expression of his policy, will not ordinarily justify a finding against him."

Here Edward L. Plummer, a witness for the respondent, testified (R. 99):

> "Q. Have you ever heard him (Mr. Garrett) say anything at all against the Union?
> "A. No, sir.
> "Q. Have you ever heard Mr. Matthews say anything against the Union?
> "A. Well, we all had a meeting there in the Charlotte office one Sunday morning.
> "Q. And didn't he say at that meeting that the Union was all right if the fellows would use their heads?
> "A. He said he didn't have any objection to our belonging to the Union.
> "Q. Did you ever talk to Mr. Raulerson about the Union in any way?
> "A. No, sir.
> "Q. Have you ever heard him say anything against the Union?
> "A. No, sir."

Robert H. Springs, another witness for the respondent, testified (R. 101):

> "Q. Now the conversation, getting down to the January meeting, do you remember Mr. Matthews saying, as certain witnesses have testified, that he did not object to the men belonging to the Union?

"A. Yes, sir, he said that.

"Q. And when you talked to Mr. Curran in Ju
was that July of this year?

"A. Yes, sir.

• • • • • • •

"Q. Did he say anything about anybody was goi
to be discharged because they belonged to the Unio

"A. No, sir.

"Q. Did he intimate to you in any way that y
or anybody else were going to lose your jobs becau
you belonged to the Union?

"A. Well no, he didn't."

L. A. Justice, likewise a witness for the respondent testified (R. 93):

"Q. None of the remarks that Mr. Matthews
Mr. Curran or any of the other officials of the Co
pany made discouraged you in your Union affiliati
at all, did they?

"A. No, sir.

"Q. Didn't frighten you?

"A. No, sir.

"Q. Didn't influence you nor affect you?

"A. No, sir.

"Q. Didn't bother you one way or another?

"A. No, sir.

• • • • • • •

"Q. Didn't bother you any more than if they h
never said it, did it?

"A. Not a bit."

The petitioner contends that the respondent's conclusi
as to alleged "disparaging remarks" by supervisory e
ployees, discouraging, restraining and coercing the pe
tioner's employees, is not justified and should not be uphe
The only remaining matter involved in the respondent
Decision and Order relates to the reinstatement of c
M. O. Rainwater. The petitioner is entirely willing

reinstate Rainwater and so stated at the hearing of the case in December, 1939 (R. 256-257). Rainwater's job with the petitioner was part-time and irregular. At the time of the strike, the petitioner hired a new employee in his place and sent him a notice that he was refusing to work (R. 108-109). Later, it appeared that at the time he was replaced and sent a notice of discharge, it was not within the scope of his duty to be at work. At any rate, as stated above, the petitioner has been and is now willing and ready to reinstate Rainwater with back pay up to the time of the hearing, when such offer of reinstatement was originally made.

In conclusion, the petitioner respectfully submits that at the time of the strike among its employees on September 6, 1939, it was at liberty to hire new employees and thereupon to terminate its relations with the striking employees in such sense that it can not now be required to discharge the new employees and reinstate with back pay the men who went out on strike. This is true for the reason that the strike was not caused by unfair labor practice on the part of the petitioner, as is definitely established by the record in this case.

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